

Ky. Op. Atty. Gen. 04-ORD-026, 2004 WL 353950 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

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February 11, 2004

In re: Vicki Henderson/Ohio County Judge/Executive and Ohio County Water District

Open Records Decision

The question presented in this appeal is whether the Ohio County Judge/Executive and Ohio County Water District subverted the intent of the Open Records Act, short of denial of inspection and within the meaning of [KRS 61.880\(4\)](#), [FN1] in the disposition of Vicki Henderson's December 19, 2003 request for information relating to a number of specifically identified bonds. For the reasons that follow, we find that the County Judge/Executive's disposition of Ms. Henderson's request was partially inconsistent with the provisions of [KRS 61.870](#) to [61.884](#), and, to the extent of these inconsistencies, constituted a subversion of the intent of the Act. However, we find that the Water District properly advised Ms. Henderson that it is not obligated to generate information independent of that which is contained in existing public records but that she would be afforded an opportunity to inspect those records which might contain the information sought.

In her December 19 emailed records application, Ms. Henderson requested access to:

[A]ll costs including but not limited to costs as to the amount and name of payee,... includ[ing] fees or commissions paid to, or anticipated to be paid to issuers, underwriters, placement agents and advisors, financial advisors, remarketing agents, credit enhancers, trustees, accountants and the counsel of all these persons, bond counsel and special tax counsel,... includ[ing] the economic benefits received or anticipated to be received by any other persons from any source in return for services performed relating to the issuance of the bonds or notes as to the following bonds:

Ohio County Water District Bonds and Notes as follows:

Bond Issue ID 8586 in the amount of \$3,514, 177 dated January 1, 1990 from KY Infrastructure Authority Loan.

Water Revenue Bond Issue ID 3633 in the amount of \$712,000.00 dated July 2, 1980; Water Revenue Bond ID 690 dated April 1, 1966 in the amount of \$940,000.00; Water Revenue Bond dated February 27, 1976, Issue ID 2987 in the amount of \$934,000.00; Bond Issue ID 2281 in the amount of \$50,000.00 dated July 1, 1971; Water Revenue Bond Issue ID 10500 dated August 1, 1998 in the amount of \$4,000,000.00; Water Revenue Bond dated August 1, 2000 Issue ID 11403 in the amount of \$4,035,000.00; Water Revenue Bond

Issue ID 6153 dated June 17, 1987 in the amount of \$2,010,000.00 and any other subsequent bonds that may have been issued.

In an undated email response, which Ohio County Judge/Executive Wayne Hunsaker indicates was transmitted to Ms. Henderson on December 22, 2003, Judge Hunsaker advised that his office “would make available... any information that it is required by law to retain.” He stated that she would be notified “within the next several weeks as to what records, if any, are available... and when [she might] inspect them.” Having received no further correspondence from Judge Hunsaker, Ms. Henderson initiated this appeal on January 12, 2004.

***2** In supplemental correspondence directed to this office following commencement of Ms. Henderson's appeal, Judge Hunsaker amplified on his position. He explained:

[O]ur initial response to Mrs. Henderson stated that we would attempt to locate the documents she seeks “within the next several weeks.” This office was closed for holidays during this time, as was the Ohio County Water District office. In addition, we were in the process of outsourcing [sic] our payroll. Since we provide weekly payroll for at least one hundred fifteen employees, this has proved to be the time consuming process that we expected, and it has been our priority.

We notified Mrs. Henderson on December 22, 2003, of our intentions and were able to give her accurate direction on January 12, 2004, i.e., within “several” weeks. Please note that we could simply have replied that we did not have these records, but rather located the records and advised her... who [] to contact for review.

Judge Hunsaker provided this office with a copy of the January 12 letter to Ms. Henderson, dated January 13, 2004, in which he stated that he had discussed her request with Walt Beasley, General Superintendent of the Ohio County Water District. Mr. Beasley advised Judge Hunsaker that the requested records are in the custody of the Water District, and Judge Hunsaker furnished her with the District's address and telephone number.

Based on this information, Ms. Henderson submitted a duplicate request to the District on January 13. Three days later, E. F. Martin, Jr., attorney for the District, responded to that request, asserting:

[U]nder the interpretations of and exceptions set out in the open records statutes, the Ohio County Water District, a public agency, is not obligated to honor a request for information as opposed to a request for a specifically described records, nor is a public agency required to comply with an open records request which places an unreasonable burden in producing such public records. Therefore, your request is understood to specifically request Ohio County Water District revenue bond records as well as any financial statements which the District may have “supplied in connection with the issuance of these bonds”.

You are also advised that the January 1, 1990, Kentucky Infrastructure Authority Loan resulted in termination of outstanding bonds, which had not previously been liquidated, including the 1966, 1971, 1976, 1980, and 1987 bonds or loans referred to in your open records request. Therefore those bond records or files are no longer maintained as current files of the Ohio County Water District. My understanding is that those files or records may have been destroyed although some may be in storage.

Accordingly, all current or outstanding revenue bond records and financial statements will be made available to you for your review and inspection on Tuesday, January 20, 2004 at the District office in Hartford, Kentucky or at your convenience.

***3** Mr. Martin suggested that Ms. Henderson contact the District to arrange for inspection of the records at a mutually agreeable time.

Ms. Henderson did so, arranging to inspect the records on February 2, 2004. Following inspection, she notified this office that she was dissatisfied with the results of her search. She observed:

[O]nly three binders were on the table for the last three bond issues that were issued in 1998, 2000 and 2003. No other records were available. We specifically requested information regarding the list of all persons who we paid a fee in connection with these bonds. The information in the bond binders as stated above only listed the amounts of the costs, but contained no information as to who the funds were paid to. I spoke to the accountant while I was at the water department and requested that he fax the information to me at that water department office. I waited an hour and no information came. I then drove back to Louisville where I work and asked the Secretary at the Water Department to fax me the information upon her receipt of it. I received two phone calls and she said that the information would not be available until Thursday of this week, and that I would have to come back to Ohio County to get the information. I told her that was unacceptable and that I wanted it faxed as we had agreed.

Ms. Henderson requested that this office “call Mr. E. F. Martin... and have the information faxed to [her]... regarding the payees of these bonds as to the items [originally] requested....”

It is the decision of this office that the Ohio County Judge/Executive failed to comply with [KRS 61.872\(4\)](#) in immediately notifying Ms. Henderson that he is not the custodian of the records identified in her request, [KRS 61.872\(5\)](#) in failing to provide a detailed explanation of the cause of the delay and stating the earliest date on which the records would be available, and/or [KRS 61.880\(1\)](#) in otherwise failing to afford her timely access to those records. To this extent, his actions constituted a subversion of the intent of the Open Records Act, short of denial of inspection, within the meaning of [KRS 61.880\(4\)](#). The exigency of other duties did not relieve the County Judge of his statutory obligation under the Act. We further find, however, that upon belated notification to Ms. Henderson that Judge Hunsaker is not custodian of the records, and resubmission of her request to the actual custodian of those records, namely, the Ohio County Water District, the District properly advised Ms. Henderson that it had no obligation to generate information dependent of that which is contained in existing public records and that she would be afforded the opportunity to inspect all current or outstanding revenue bond records and financial statements to extract the requested information. Nevertheless, the paucity of records subsequently produced by the District for Ms. Henderson's inspection raises records management issues which may be appropriate for review by the Department for Libraries and Archives under authority of Chapter 171 of the Kentucky Revised Statutes. We have referred this matter to the Department for whatever action that agency deems appropriate.

***4** [KRS 61.880](#) sets forth the legal obligations of a public agency upon receipt of an open records request. Subsection (1) of that provision requires a public agency to respond to the requesting party within three working days of receipt of the request, notifying the party whether it will comply with his request. These requirements, the Attorney General has often noted, “are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request.” 93-ORD-125, p. 5. Discharge of these duties is required by law, and is as much a legal obligation of a public agency as the provision of essential services to the public.

In a seminal decision addressing these duties, the Attorney General observed:

Nothing in the statute permits an agency to postpone or delay this statutory deadline... The burden on the public agency to respond in three working days is, not infrequently, an onerous one. Nevertheless, the only exceptions to this general rule are found at [KRS 61.872\(4\)](#) and (5). Unless the person to whom the request is directed does not have custody and control of the records, or the records are in active use, in storage, or are not available, the agency is required to notify the requester of its decision within three working days, and to provide the requester with timely access to the requested records.

93-ORD-134, p. 3. In that decision, 93-ORD-134, the Attorney General concluded that the agency failed to provide timely access to the records identified in the request. It is the decision of this office that the Ohio

County Judge/Executive erred in failing to notify Ms. Henderson in writing, and within three business days, that he is not the custodian of the records to which she requested access, pursuant to [KRS 61.872\(4\)](#), [FN2] or to otherwise afford her timely access to those records as that phrase is contemplated by [KRS 61.872\(5\)](#) [FN3] and/or [KRS 61.880\(1\)](#).

In analyzing the issue of “timely access,” the Attorney General observed:

“Timely access” to public records has been defined as “any time less than three days from agency receipt of the request.” OAG 84-300, at p. 3. In OAG 83-23, at page 4, we expressly held that an agency had not acted in accordance with [KRS 61.870](#) to [61.884](#) “in its failure to allow inspection or make a proper response to [a] request to inspect records after three months from the date of [the] initial request.”

The Open Records Act does not prescribe a reasonable time within which access must be afforded to public records.... [KRS 61.872\(5\)](#) normally requires an agency to notify the requester and designate an inspection date not to exceed three days from agency receipt of the request.

In an early opinion, this Office recognized:

Every request to inspect a public record causes some inconvenience to the staff of the public agency. No doubt some state, county and local agencies have found it necessary to employ additional staff since the enactment of the Open Records Law in order to comply with the provisions of the law.... We believe it is the legislative intent that public employees exercise patience and long-suffering in making public records available for public inspection.

*5 OAG 77-151, at p. 3.... We believe that a determination of what is a “reasonable time” for inspection turns on the particular facts presented, i.e., the breadth of the request and the number of documents it encompasses, as well as the difficulty of accessing and retrieving those records. Public agencies must work, in a spirit of cooperation, with individuals who request to inspect their records to insure that those individuals are afforded timely access to the records they wish to inspect.

00-ORD-117, p. 3, 4.

Clearly, the County Judge's inaction resulted in an inordinate delay in the ultimate disposition of Ms. Henderson's request. That request was submitted on December 19, 2003 but not finally resolved until January 13, 2004. Although Judge Hunsaker responded on December 22 that his office would “make available... any information that it is requested by law to retain... within the next several weeks...,” this response did not conform to the specific requirements of [KRS 61.872\(4\)](#), [KRS 61.872\(5\)](#), or [KRS 61.880\(1\)](#). Although he intimated that the request would be honored in time, Judge Hunsaker did not provide a detailed explanation of the cause of the delay or state the earliest date on which the records would be available. Alternatively, and as noted, he did not promptly notify Ms. Henderson that he was not the custodian of the requested records and furnish her with name and location of the actual records custodian. Given the express language of [KRS 61.872\(4\)](#), [FN4] we do not agree that he had no obligation to provide her with the latter information or take appropriate action to insure timely access to those records. An agency response that it cannot immediately comply with the request, without explanation, or with a belated explanation that the agency had to give priority to the process of outsourcing payroll is insufficient to meet the requirements of [KRS 61.872\(5\)](#). [FN5] 96-ORD-238; 00-ORD-117. The duty to respond to an open records request, and to afford the requester timely access to the records identified in her request, is, as we have noted, as much a public official's legal duty as any other essential function. 00-ORD-117, p. 5.

Having said this, we note that Judge Hunsaker advised Ms. Henderson that he was not the custodian of records by letter dated January 13, 2004, and she immediately submitted a duplicate request to the Ohio County Water District, identified in Judge Hunsaker's letter as the official custodian of the records sought. As required by [KRS 61.880\(1\)](#), the District issued a timely response to Ms. Henderson, through its attorney E. F. Martin, Jr., in

which Mr. Martin properly notified Ms. Henderson that the District is not obligated to compile information that conforms to the parameters of her request, and extended an invitation to her to conduct an on-site inspection of “all current or outstanding revenue bond records and financial statements....” Although Ms. Henderson was dissatisfied with the results of her on-site inspection, we find no error in the District's disposition of her open records request.

***6** Ms. Henderson's request was not framed as a request for reasonably described public records but instead as a request for information to be extracted from reasonably described public records. The Attorney General has long recognized that a public agency is not obligated to honor a request for information as opposed to a request for specifically described records. “The purpose of the Open Records Law is not to provide information but to provide access to public records which are not exempt by law.” OAG 79-547, p. 2. Although information may be gleaned from these records, it is the public agency's duty to make public records available for inspection and copying. Public agencies are not required to gather and supply information independent of that which is set forth in public records. As we noted at page 5 of OAG 89-81:

Open Records provisions were not intended to serve as a comprehensive audit tool, or as a means of commanding compilation of and production of specific information. Open Records provisions are intended to provide for inspection of reasonably described records held by public agencies. See OAG 76-375. Open Records provisions do not provide for, and agency workers are not required to provide under them, instruction in understanding of the meaning or import of information shown upon records produced.

Obviously, information will be obtained from inspection of the records and documents, but the duty imposed upon public agencies under the Act is as noted, to make public documents available for inspection and copying. We therefore conclude that the Ohio County Water District's response to Ms. Henderson's request for information, as opposed to a request for specifically described records, did not violate the Open Records Act. The fact that her search proved partially unproductive does not alter our conclusion. Having afforded her access to all records in its custody that might contain the information sought, we find that the District fully discharged its duties under the Open Records Act.

Nevertheless, the intent of the Open Records Act has been statutorily linked to the intent of Chapter 171 of the Kentucky Revised Statutes, relating to the management of public records. [KRS 61.8715](#) now provides “that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of [\[KRS 171.410 to 171.740\]](#), dealing with the management of public records, and [KRS 61.940 to 61.957](#), dealing with the coordination of strategic planning for computerized information systems[.]” The General Assembly has thus recognized “an essential relationship between the intent of [the Open Records Act]” and statutes relating to records management. *Id.*

Our review of the pertinent portion of Local Government General Records Schedule, a copy of which is attached hereto, indicates that a bond record file, Series L5008, is a permanent record that must be retained at the agency permanently. Cancelled Bonds and Coupons, Series L5009, on the other hand, must be retained at the agency for an indefinite period with disposition instructions to “Destroy 3 years after maturity and audit.” The Description and Analysis for Bond Record Files states that “[t]his record series documents each bond issue and subsequent activity[, and] is a record of when the bonds are issued and when they mature.” It describes the contents of the record series as follows:

***7** This record series contains the name of issuer, name of series, date, denomination, numbers, interest rate, first interest coupon payable on, coupon payable thereafter on, at which bank payable, amount issued, bond

numbers, number of bonds due, denomination of bonds due, maturity dates, funds sent paying agent (date fund sent, amount sent, including agents charges). Record of interest coupons: bond numbers, date cancelled, interest coupon numbers and the certificate of disposal.

If, in fact, any of the records implicated by Ms. Henderson's request fall within Series L5008 of the schedule, they may not have been properly maintained. Given the paucity of records produced in response to her request, and Mr. Martin's statement that "those files or records may have been destroyed," we have referred this matter to the Department for Libraries and Archives, pursuant to [KRS 61.8715](#), for additional inquiry as that agency deems warranted.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.880\(5\)](#) and [KRS 61.882](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Gregory D. Stumbo
Attorney General

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Assistant Attorney General

[FN1]. [KRS 61.880\(4\)](#) provides:

If a person feels the intent of [KRS 61.870](#) to [61.884](#) is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

[FN2]. [KRS 61.872\(4\)](#) provides:

If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.

[FN3]. [KRS 61.872\(5\)](#) provides:

If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

[FN4]. If the person to whom the application is directed does not have custody or control of the public record requested, *that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.* (Emphasis added.)

[FN5]. If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, *unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.* (Emphasis added.)

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